



Dental Justice™ : Patient-Dentist Contract Template Language **(Public Domain Disclosure and Anti-Defamation)**

The Internet has made it easy for one person to transmit information to thousands; indeed millions, with the click of a mouse. On occasion, such information transfer can cause irreparable damage to a dentist's reputation. An unhappy patient can maliciously filter or fabricate information that places the dentist in the worst possible light. Such venues include blog sites, chat rooms, web sites, and traditional print or broadcast media.

Dental Justice has developed a mechanism intended to increase control of potentially damaging content – before it becomes a problem.

Historically, a person who was defamed could find their remedy in the courts. But, two recent cases make it practically impossible to address many “Internet” issues after-the-fact. One case, *Barrett*¹, concluded that Internet Service Providers (“ISP”) could not be held liable for republishing defamatory content, even if they were made aware of the falsity of the content. In other words, the ISPs were given free reign to avoid policing its sites. This is in spite of the fact that most web sites have a “Universal Terms of Service” agreement with web site owners, bloggers, and the like which reads:

ISP reserves the right to terminate Services if Your usage of the Services results in, or is the subject of, legal action or threatened legal action, against ISP or any of its affiliates or partners, without consideration for whether such legal action or threatened legal action is eventually determined to be with or without merit.

Except as set forth below, ISP may also cancel Your use of the Services, after thirty (30) days, if You are using the Services, as determined by ISP in its sole discretion, in association with.....morally objectionable activities. Morally objectionable activities will include, but not be limited to: activities designed to defame, embarrass, harm, abuse, threaten, slander or harass third parties.

So, although ISPs have the ability to take down a disparaging web site, there does not appear to be any penalty to their sitting on the sidelines and doing nothing. More importantly, ISPs are given near immunity for allowing purely defamatory posts to litter their site. Threatening to sue such sites for defamation will often be followed by a letter stating they have neither the time nor resources to evaluate each and every claim. More importantly, Section 230 of the Communication Decency Act provides a safe harbor to allow them to post without legal accountability. The government says, if you have a beef, take it up with the individual who posted the commentary.

Easier said than done. First, many posts are anonymous. Equally challenging is the “standard of proof.” Recently, a disgruntled patient launched a web site talking about her so-called “surgery nightmare.” The California appellate court ruled in 2007 that the site can stay up. The surgeon was judged to be a “public figure” and the standard for defamation in that case is clear and convincing evidence of a malicious intent. This threshold is tough to overcome in all but the most egregious of cases.

¹ *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

The two cases described are based on California law. They are binding in California. They are also likely to be perceived as “persuasive” in other states. The status quo allows a patient to defame a dentist with select information. The dentist ordinarily cannot counter without revealing confidential, protected information. The form language, if used by the dentist, and signed by the patient, mandates bilateral obligations. The contract may be placed in the context of HIPAA privacy discussions. HIPAA mandates that the dentist will not disclose any protected health information except as required by law or except as defined with the patient’s agreement. The form states that the dentist will not even approach the patient to pre-authorize release to sell protected health information for marketing by third parties. This is an additional privacy protection above and beyond that mandated by HIPAA or state confidentiality laws. It is important that if the dentist chooses to use such language, the dentist honor this clause.

Nothing in the form prevents the patient from speaking privately about his or her care to another dentist, a family member, a friend, or more. Indeed, the patient can speak to any third party. But the language, then, balances the legitimate rights of the patient with the dentist.

The form also has a built-in safety net. If the patient posts onto the Internet, the copyright of that commentary is assigned to the doctor. So, the doctor has a powerful tool to take damaging posts down.

A housekeeping detail. If such language is used, it will be most effective if all patients sign such an agreement. The language notes that, as a matter of policy, the dentist asks all patients to do so. This should be an effective way to address blogging by anonymous posters.

Finally, for your information, the substantive language in the template has been reviewed by Office of Inspector General for U.S. Dept. Health and Human Services. The Office addresses issues related to HIPAA and Privacy. They concluded the template language does not clash with provisions of HIPAA.

In sum, then, the Internet can be used to build or destroy the stature of a doctor. Proper safeguards, up front, can protect the most valuable asset a dentist owns- his or her reputation.²

² © Copyright. All rights reserved. Licensed use of the template language (or essentially similar language), in part or in whole, in any format, is granted only *to current individual plan members* of Medical Justice[®] Services, Inc., dba Dental Justice and only *for* the time interval that the plan membership is documented as being active with prospective plan. License is not granted to non-member dentists who are partners, shareholders, or members of a corporate entity containing a Dental Justice member. Licenses are not granted related to the use of any trade-named product, trade-named professional service or procedure, and/or franchise entity. Further, there are no sublicense rights. Template language, if used, like all agreements, should be reviewed with your local counsel.

Sample Language (Version 2.0.5T):

MUTUAL AGREEMENT

Dr. _____ and _____ [insert name of Dentist and corporate entity] (collectively labeled “*Dentist*”) agree to provide treatment to _____ (“*Patient*”). The Dentist takes pride in being able to extend a greater degree of privacy than is required by law.

Federal and State privacy laws are complex. Unfortunately, some dental offices try to find loopholes around these laws. For example, dentists are forbidden by law from receiving money for selling lists of patients or medical information to companies to market their products or services directly to patients without authorization. Some dental practices, though, can lawfully circumvent this limitation by having a third party perform the marketing. While personal data is never technically in the possession of the company selling its products or services, the patient can still be targeted with unwanted marketing information. Dentist believes this is improper and may not be in the patients’ best interest. Accordingly, Dentist agrees not to provide medical/dental information for the purpose of marketing directly to Patient. Regardless of legal privacy loopholes, Dentist will never attempt to leverage its relationship with Patient by seeking Patient’s consent for marketing products for others.

We want your feedback. If our office gets it right, tell us. If we could do something better, tell us. We take quality improvement seriously. While there are scores of “rating sites” in cyberspace, many fail to provide useful information. Let’s get it done right. We can make recommendations as to which sites follow minimum standards for fairness and balance. Just ask us.

Dentist has invested significant financial and marketing resources in developing the practice. Nothing in this Agreement prevents a patient from posting commentary about the Dentist - his practice, expertise, and/or treatment - on web pages, blogs, and/or mass correspondence. In consideration for treatment and the above noted patient protection, if Patient prepares such commentary for publication about Dentist, the Patient exclusively assigns all Intellectual Property rights, including copyrights, to Dentist for any written, pictorial, and/or electronic commentary. This assignment shall be operative and effective at the time of creation (prior to publication) of the commentary.

This Agreement shall be in force and enforceable for a period of five years from Dentist’s last date of service to Patient. As a matter of office policy, Dentist is requiring all patients in its practice sign the Mutual Agreement so as to establish that any anonymous or pseudonymous publishing or airing of commentary will be covered by this agreement for all Dentist’s patients. Further, this Agreement will survive for a minimum of three years beyond any termination of the Dentist-Patient relationship.

Patient and Dentist acknowledge that breach of this Agreement may result in serious, irreparable harm. Patient and Dentist agree to the right of equitable relief (including but not limited to injunctive relief). Should a breach of this Agreement result in litigation, the prevailing party in the litigation shall be entitled to reasonable costs, expenses, and attorney fees associated with the litigation.

Patient has been given the opportunity to ask questions and receive satisfactory and adequate explanations.

SO AGREED THIS ___ DAY OF _____, 200__ . _____ (PATIENT)

Dr. Fawn Rosenberg DMD, FAGD